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In the Supreme Court of the United States

JAMES OBERGEFELL, ET AL.,
Petitioners,

v.

RICHARD HODGES, DIRECTOR,
OHIO DEPARTMENT OF HEALTH, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

Americans United for Separation of Church and State is a national, nonsectarian, public-interest organization dedicated to defending the constitutional principles of religious liberty and separation of church and state. Americans United represents more than 120,000 members, supporters, and activists across the country. Since its founding in 1947, Americans United has regularly served as a party, as counsel, or as an *amicus curiae* in scores of church-state cases before this Court and other federal and state courts nationwide.

One of Americans United's principal goals is to protect the rights of individuals to hold and practice the religious beliefs of their choice without interference by government. Americans United has advocated for these rights as counsel and *amicus* in many cases, including suits by prison inmates to protect their rights to worship (see *Holt* v. *Hobbs*, 135 S. Ct. 853 (2015); *Sossamon* v. *Texas*, 131 S. Ct. 1651 (2011); *Cutter* v. *Wilkinson*, 544 U.S. 709 (2005)), by a public-school student to be permitted to wear his hair in accordance with the tenets of his religion (see *A.A. ex rel. Betenbaugh* v. *Needville Indep. Sch. Dist.*, 611 F.3d 248 (5th Cir. 2010)), by a church to be allowed to engage in its religious rituals without being prosecuted under the nation's drug laws (see *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006)), and by survivors of fallen soldiers of minority faiths to be given the same level of recognition on government-issued burial markers as is provided to adherents of more established faiths

(*Circle Sanctuary* v. *Nicholson*, No. 3:06-cv-0660 (W.D. Wis. Nov. 13, 2006)).

Americans United files this brief to explain that recognizing that same-sex couples have the right to marry will pose no genuine threat to religious freedom. Rather, our Constitution and laws have the wisdom and capacity to protect both the fundamental rights of people who love and wish to marry others of the same gender and the fundamental freedoms of people of faith who wish to practice and live their lives in accordance with their beliefs.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

This brief addresses an issue that, although peripheral to the question directly before the Court in these cases, has been the subject of much attention in this and related litigation: whether religious objections that have been raised to marriage for same-sex couples have any bearing on whether a constitutionally grounded right to such marriages should be recognized *at all*. The short answer is that those objections are wholly beside the point here. That some people have religious objections to others' exercise of a fundamental right or entitlement to equal treatment under the law has never been thought a valid reason for wholly denying any recognition of the constitutional protection. Moreover, many of the feared conflicts between religious liberty and recognition of same-sex couples' right to marry are chimerical. And

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[1] *Amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* or its counsel made a monetary contribution to the brief's preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

to the extent that such conflicts are real, they can be fully addressed by existing doctrines and mechanisms for reconciling religious practice with public obligations.

1. Opponents of the right of same-sex couples to marry have argued that recognition of that right would interfere with the religious liberty of persons who object to such marriages. Predicting a flood of discrimination lawsuits against religious objectors, those making this argument have advanced the extraordinary contention that the potential for these conflicts counsels against recognition of marriage rights *at all*. These opponents have thus urged courts to deny recognition of the constitutional right of same-sex couples to marry so that legislatures may have an opportunity to craft religious exemptions to statutory antidiscrimination provisions that otherwise might protect married same-sex couples from differential treatment. Such exemptions, this argument goes, are necessary to address conflicts between the emerging rights of same-sex couples and the rights of religious objectors to their relationships.

Those arguments should play no role in this Court's decision. Throughout our nation's history, courts and legislatures have grappled with ostensible clashes between legal mandates—including, most notably, those grounded in the Constitution—and religiously based objections to compliance with the law. When conflicts have arisen, they have long been properly addressed through well-established legal frameworks that protect both sets of interests. These include the array of federal and state statutory protections that mandate respect for religious practices, on the one hand, and those principles requiring equal

treatment and the uniform application of the laws, on the other.

There is simply no reason to think that the recognition of a constitutional right to marry would lead to any new or intractable conflicts between religious liberty and antidiscrimination provisions. The Court's recognition of a right to marry will not automatically extend or alter any protections for same-sex couples currently available under federal or state antidiscrimination laws. In many instances these antidiscrimination provisions *already* protect lesbians and gay men, and hence extend to individuals in same-sex relationships regardless of their marital status. But in all events, whether same-sex couples' constitutional right to marry is recognized and the scope of those couples' statutory rights to be free from discrimination by private actors once they *are* married are entirely separate matters. The latter is not at issue in these cases and should not affect this Court's decision.

2. Much of the argument that recognition of marriage rights will interfere with religious belief is grounded in the fear that the Court's sanctioning of marriage for same-sex couples will reflect a public judgment that religious objections to such marriages are invalid. That worry is both unjustified and immaterial to the question before the Court. The Constitution strongly respects and preserves religious freedom. It also provides, however, that religious objections by third parties to the application of fundamental rights (or to the people exercising those rights) are not a valid basis for refusing to recognize the rights in the first place. The same objections were raised to doctrines affording equal rights and fundamental protections to racial minorities—

including, famously, the right to marry—and were properly dismissed as presenting no obstacle to the exercise of individual freedom. Certainly, religious objections to equality before the law for particular sets of disfavored persons cannot be controlling in a system that protects both the right to pursue one's specific religious beliefs and the fundamental rights of all citizens.

ARGUMENT

Litigants who oppose allowing same-sex couples to marry argued below, and in similar cases in other courts, that the federal courts should refuse to recognize the right to marry so as to avoid interfering with the beliefs of those who have religious objections to the marriage of same-sex couples. See, *e.g.*, Brief *Amicus Curiae* of The Becket Fund for Religious Liberty in Support of Defendants-Appellants and Reversal, *DeBoer* v. *Snyder*, No. 14-1341 (6th Cir. May 13, 2014), ECF No. 55 ("Becket Fund 6th Cir. Amicus Br."); Petition for a Writ of Certiorari, *Elane Photography, LLC v. Willock*, No. 13-585 (U.S. Nov. 8, 2013), cert. denied, 134 S. Ct. 1787 (2014); Thomas More Society, Letter to Illinois General Assembly (Jan. 3, 2013) available at http://tinyurl.com/ly94lff. These litigants argue that recognition of the right to marry will give rise to severe clashes between religious rights and antidiscrimination laws, lead to the denial of federal benefits to religious organizations, and trigger a flood of litigation against religious institutions and individuals. Those advancing such arguments would have the Court conclude that, rather than unleash this parade of horribles, it would be better simply to avoid recognizing the right to marry altogether.

These arguments against recognition of the right to marry are peculiar and deeply ahistorical. First, our system of laws already protects *both* religious liberty *and* equal treatment for disfavored classes, and existing legal mechanisms are entirely adequate to address any conflicts between religious practices and the protections afforded to married same-sex couples. Second, the recognition of the right to marry will not exacerbate any actual or potential conflicts between religious objectors and the prohibitions against discrimination, which will continue to exist regardless of marriage rights. Finally, in our pluralistic society, arguments that the exercise of a fundamental right or the effectuation of equal treatment may offend some people's religious beliefs have never been considered a legitimate basis for denying otherwise valid constitutional protections. Nor should they be here.

I. CURRENT LAW PROPERLY PROTECTS BOTH RELIGIOUS BELIEFS AND THE NONDISCRIMINATION PRINCIPLE.

Any diverse society that embraces both religious freedom and the nondiscrimination principle will inevitably encounter occasional friction between particular religious beliefs and neutral laws that bar discrimination and ensure equal treatment. But although such conflicts may be inevitable, they are not intractable. Precisely because the wide diversity of religious views means that some people may have sincere religious objections to others' exercise of fundamental rights or to equal treatment, the U.S. Constitution, state constitutions, and many federal and state statutes provide mechanisms for protecting these important parallel interests. Especially given this existing framework for addressing these compet-

ing values, the potential for conflict with religious beliefs is not a valid reason to withhold or delay the recognition of important rights and protections, including the right to marry.

A. Decisions Construing The Free Exercise Clause Protect Both Religious Observance And The Government's Interest In Enforcing Neutral Laws.

Cases construing the Free Exercise Clause of the First Amendment set forth a baseline rule for recognizing religious freedom while ensuring the fair application of neutral laws that protect all citizens: laws that target or selectively disadvantage religious practices are suspect, but generally applicable laws that incidentally impinge on religious practice are not. The Free Exercise Clause expansively protects "the right to believe and profess whatever religious doctrine one desires." *Emp't Div., Dep't of Human Res.* v. *Smith*, 494 U.S. 872, 877 (1990). But an individual's religious beliefs do not "excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Id.* at 878-879. Thus, although the law may not single out religion or any particular faith for unfavorable treatment, a religiously neutral, generally applicable law does not run afoul of the Free Exercise Clause "even if the law has the incidental effect of burdening a particular religious practice." *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 531 (1993). As this Court has explained, because "we are a cosmopolitan nation made up of people of almost every conceivable religious preference," a contrary rule would pose the unworkable prospect of "religious exemptions from civic obligations of almost every

conceivable kind." *Smith*, 494 U.S. at 888-889 (internal quotation marks omitted).

In keeping with these fundamental principles, this Court has developed a nuanced body of law to determine when generally applicable requirements must give way to religious rights, and when they must not. For example, the Court has held that "government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief." *City of Hialeah*, 508 U.S. at 543. This means that, to satisfy the First Amendment standard, laws must be both facially neutral and generally applicable regardless of faith. Accordingly, laws that are designed to "infringe upon or restrict practices *because* of their religious motivation" are invalid unless they are narrowly tailored to serve a compelling governmental interest. *Id.* at 533 (emphasis added).

At the same time, the Court has also recognized religious exceptions to generally applicable laws in "hybrid situations" involving "the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press." *Smith*, 494 U.S. at 881-882 (listing cases); see, *e.g.*, *Wisconsin* v. *Yoder*, 406 U.S. 205, 232 (1972) (recognizing exemption from compulsory-school-attendance law for Amish children who have completed the eighth grade because of the "fundamental interest of parents" in "guid[ing] the religious future and education of their children"); *Wooley* v. *Maynard*, 430 U.S. 705, 713 (1977) (citing respondents' strong religious objections in holding that a State may not "require an individual to participate in the dissemination of an ideological message by displaying it on his private property").

Finally, this Court has recognized a constitutionally based "ministerial exception" that protects religious organizations' freedom to select their own clergy and other ministerial employees. See *Hosanna-Tabor Evangelical Church & Sch.* v. *EEOC*, 132 S. Ct. 694, 705-706 (2012). This exception precludes the application of employment-discrimination laws to certain hiring decisions by religious organizations so as to ensure that the "authority to select and control who will minister to the faithful" belongs to the "church[ ] alone." *Id.* at 709.

B. Federal And State Statutes Further Accommodate Religious Objections To General Laws.

Beyond these protections, many federal and state statutes further accommodate religious practice, addressing circumstances in which particular government requirements have arguably adverse consequences for the exercise of religious beliefs.

As this Court is aware, two major federal statutes are dedicated solely to preserving the rights of religious persons and institutions to believe and practice their faith without undue interference from government. The Religious Freedom Restoration Act (RFRA) requires that the federal government demonstrate that burdens on a person's exercise of religion serve "a compelling governmental interest" and are "the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1; see *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006). The Religious Land Use and Institutionalized Persons Act (RLUIPA) provides that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution"

(*i.e.*, a prison or state hospital) that receives federal financial assistance. 42 U.S.C. § 2000cc-1(a); see *Holt* v. *Hobbs*, 135 S. Ct. 853 (2015); *Cutter* v. *Wilkinson*, 544 U.S. 709 (2005). RLUIPA also provides that "[n]o government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person" without showing a compelling governmental interest and narrow tailoring. 42 U.S.C. § 2000cc(a). And RLUIPA specifies that "[n]o government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution" or "impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination." *Id.* § 2000cc(b). Nineteen States have enacted constitutional or statutory provisions similar to RFRA, and one has enacted a statute similar to RLUIPA.[2]

Other federal and state statutes, regulations, and executive orders provide protections for religious people, institutions, and practices as part of a broader set of antidiscrimination provisions. To take just a few representative examples: Title VII of the Civil Rights Act of 1964 forbids discrimination in employ-

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[2] See Ala. Const. art. I, § 3; Ala. Const. amend. 622, § 5(a)–(b); Ariz. Rev. Stat. § 41-1493.01(B); Conn. Gen. Stat. § 52-571b(b); Fla. Stat. § 761.03(1); Idaho Code § 73-402(2)–(3); 775 Ill. Comp. Stat. 35/15; Kan. Stat. § 60-5303(a); Ky. Rev. Stat. § 446.350; La. Rev. Stat. § 13:5233; Miss. Code § 11-61-1(5); Mo. Rev. Stat. § 1.302(1); N.M. Stat. § 28-22-3; 51 Okla. Stat. tit. 51 § 253; 71 Pa. Stat. § 2404; R.I. Gen. Laws § 42-80.1-3; S.C. Code § 1-32-40; Tenn. Code § 4-1-407(c); Tex. Civ. Prac. & Rem. Code § 110.003(a)-(b); Utah Code § 63L-5-201(1) (land-use protection akin to federal RLUIPA); Va. Code § 57-2.02(B).

ment on the basis of "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2; see *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977). Title IV authorizes the Attorney General to institute civil suits in the name of the United States to obtain relief on behalf of any student who "has been denied admission to or not permitted to continue in attendance at a public college by reason of race, color, religion, sex or national origin." 42 U.S.C. § 2000c-6(a)(2). And by executive order, the federal government guarantees that "[n]o individual, on the basis of race, sex, color, national origin, disability, religion, age, sexual orientation, or status as a parent, shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination in, a Federally conducted education or training program or activity." Exec. Order No. 13160, § 1-102, 65 Fed. Reg. 39,773, 39,775 (June 23, 2000); see also Exec. Order No. 13672, 79 Fed. Reg. 42,971 (July 21, 2014).

Both Congress and the States have also provided certain exemptions from general nondiscrimination provisions for religious institutions. For example, Title VII exempts "religious corporation[s], association[s], educational institution[s], [and] societ[ies]" from the prohibition against making hiring decisions on the basis of religion. 42 U.S.C. § 2000e-1. Many state and local governments have crafted similar religious exemptions from their statutory prohibitions against religion-based employment discrimination. See, *e.g.*, Cal. Gov't Code § 12922; Colo. Rev. Stat. § 24-34-402; Del. Code Ann. tit. 19, § 711; Md. Code, State Gov't § 20-605(a)(1). Title IX of the Education Amendments of 1972 forbids sex discrimination in educational programs that receive federal financial assistance but exempts "[e]ducational institutions of religious organizations with contrary religious ten-

ets." 20 U.S.C. § 1681(a)(3). Some States similarly exempt religious schools from antidiscrimination laws that would otherwise prohibit the schools from making admissions decisions on the basis of religion—or on the basis of sexual orientation or other protected categories. See, *e.g.*, Cal. Educ. Code § 221; D.C. Code § 2-1402.41; Me. Rev. Stat. tit. 5, § 4602; Minn. Stat. § 363A.23. And some States provide exemptions from fair-housing laws for religious organizations that wish to give preferences to members of their own denomination. See, *e.g.*, Cal. Gov't Code § 12955.4; Colo. Rev. Stat. § 39-3-112.

These statutory schemes have obvious implications for the argument that conflicts ensuing from recognition of same-sex couples' right to marry militate against recognizing that right at all. Whatever one's view of the need for these particular statutory protections, exemptions, and exceptions, it cannot be gainsaid that there exist well-developed legislative frameworks at both the federal and state levels that directly address and provide clearly articulated principles for resolving questions that may arise when antidiscrimination requirements intersect with religious-liberty claims. These principles will apply, and will provide clear guidance, if and when conflicts arise in connection with the right of same-sex couples to marry.

II. MARRIAGES BY SAME-SEX COUPLES WOULD NOT POSE UNIQUE ISSUES UNDER EXISTING RULES REGARDING THE ACCOMMODATION OF RELIGIOUS RIGHTS AND ANTIDISCRIMINATION PRINCIPLES.

A. Recognition Of Same-Sex Couples' Right To Marry Would Not Interfere With Religious Doctrine Or Practice.

Having said that, the reality is that there is unlikely to be unremitting and intractable conflict between effectuation of the right of same-sex couples to marry and the exercise of religious belief. Opponents of the right to marry raise the specter of a flood of discrimination suits against religious institutions and individuals, and a concomitant loss of governmental benefits by these institutions, once a marriage right is recognized. But those concerns are a parade of red herrings, not horribles.

To begin with, there simply is no direct conflict between the recognition of marriage rights and respect for religious beliefs. On the contrary, "the government's decisions regarding civil marriage do not in any way implicate religious practice or belief and impose no obligation on religious individuals or institutions to adopt for their own purposes the definition of marriage adopted for civil purposes by the state." Laurence H. Tribe & Joshua Matz, *The Constitutional Inevitability of Same-Sex Marriage*, 71 Md. L. Rev. 471, 484-85 (2012) (citing *Varnum* v. *Brien*, 763 N.W.2d 862, 905-06 (Iowa 2009)); *accord* Ira C. Lupu & Robert W. Tuttle, *Same-Sex Family Equality and Religious Freedom*, 5 Nw. J.L. & Soc. Pol'y 274, 294 (2010).

That is because the legalization of marriage for same-sex couples would leave "religious institutions * * * as free as they always have been to practice their sacraments and traditions as they see fit." *Kitchen* v. *Herbert*, 755 F.3d 1193, 1227 (10th Cir.) (affirming unconstitutionality of Utah's marriage ban), cert. denied, 135 S. Ct. 265 (2014). Denominations, houses of worship, and clergy would remain entirely free to decide which marriage ceremonies to perform and which marriages to recognize as sanctified by their faith—just as they are and always have been free to decide, for example, whether to bless marriages of couples of different faiths or to allow such couples to partake of their sacraments in religious marriage ceremonies. The argument against marriage accordingly is not that persons will be affected in any way in the exercise of their religion; it is that their religious beliefs entitle them to discriminate against others.

B. State Antidiscrimination Provisions Generally Prohibit Discrimination Based On Sexual Orientation, Not Marriage.

Moreover, the assertion of religious interests by those opposed to marriage of same-sex couples is nothing new and is not specific to the right to marry. Instead, to the extent that state laws protect same-sex couples against discrimination, they generally do so based on sexual orientation, not marital status. These protections already exist in many jurisdictions, and they operate independently of any federally recognized right to marry. Thus, as the Ninth and Tenth Circuits observed in their decisions recognizing the right of same-sex couples to marry, any antidiscrimination suits brought by same-sex couples

"would be a function of anti-discrimination law, not [of] legal recognition of same-sex marriage." *Kitchen*, 755 F.3d at 1228 n.13; see also *Latta* v. *Otter*, 771 F.3d 456, 475 (9th Cir. 2014) (similar), petition for cert. filed, No. 14-788 (U.S. Jan 2, 2015). The scope and effect of any applicable antidiscrimination laws are not before this Court now, and concerns about the intersection of religious rights and such provisions therefore should not affect the Court's decision in the cases that are now before it.

Indeed, courts already address allegations of discrimination against same-sex couples by religious objectors, and few if any cases have arisen as a result of the recognition of a marriage right. The cases have instead involved requests for enforcement of antidiscrimination laws that protect against discrimination on the basis of sexual orientation more broadly. See Douglas Nejaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 Cal. L. Rev. 1169, 1175 (2012) ("Clashes between sexual orientation equality and religious freedom prominently feature same-sex relationships, rather than same-sex marriages."); see also Elizabeth Sepper, *Doctoring Discrimination in the Same-Sex Marriage Debates*, 89 Ind. L.J. 703, 714-15 (2014) (noting that "[i]n those states legalizing marriage equality, sexual orientation antidiscrimination laws already address those acts that are cited as examples of religious objections to same-sex marriage").

To take a recent example that has garnered much public attention, *Elane Photography, LLC* v. *Willock*, 309 P.3d 53 (N.M. 2013), cert. denied, 134 S. Ct. 1787 (2014), involved a lesbian couple who successfully sued a photographer under New Mexico law

after the photographer refused to photograph the couple's commitment ceremony. Although *Elane Photography* is frequently offered as an example of the type of suit that will result from recognizing the right of same-sex couples to marry, the dispute in fact arose more than seven years *before* New Mexico recognized the right to marry. Compare *Elane Photography, LLC* v. *Willock*, 284 P.3d 428, 433 (N.M. Ct. App. 2012) (plaintiff's discrimination claim filed in December 2006), aff'd, 309 P.3d 53 (N.M. 2013), with *Griego* v. *Oliver*, 316 P.3d 865, 889 (N.M. 2013) (holding that denial of marriage rights to same-sex couples violates the New Mexico Constitution). The New Mexico Supreme Court rested its decision in *Elane Photography* on an interpretation not of the state constitution, but of the New Mexico Human Rights Act, N.M. Stat. § 28-1-7, which broadly prohibits discrimination in employment, housing, and public accommodations based on "race, religion, color, national origin, ancestry, sex, sexual orientation, gender identity, spousal affiliation, or physical or mental handicap."

Similarly, the dispute in *Bernstein* v. *Ocean Grove Camp Meeting Ass'n*, No. DCR PN34XB-03008 (N.J. Off. of Att'y Gen., Div. on Civil Rts., Oct. 23, 2012), arose out of denial of a lesbian couple's request to rent a boardwalk pavilion for a commitment ceremony when the pavilion was generally available for rent by the public and no rental request had ever before been denied except when there were scheduling conflicts. The dispute was resolved under the New Jersey public-accommodations law more than six years before that State recognized the right of same-sex couples to marry. Compare *id.* at *1 ("On June 19, 2007, Complainants filed a verified complaint with the DCR"), with *Garden State Equality* v.

Dow, 82 A.3d 336, 369 (N.J. Super. Ct., 2013) (holding that denial of marriage rights to same-sex couples violates New Jersey constitution).

Likewise, *Butler* v. *Adoption Media LLC*, 486 F. Supp. 2d 1022 (N.D. Cal. 2007), involved allegations of discrimination in the provision of adoption-related services by a website that refused to list gay couples as adoptive parents seeking a child, under a policy of accepting only married heterosexual couples as potential adoptive parents. The case, which was litigated under California's antidiscrimination law, did not turn in any respect on marriage rights for same-sex couples, which had not been recognized in California at the time, but on more general questions of discrimination on the basis of sexual orientation.

Other cases identified by opponents of marriage rights as illustrative of the disputes that would arise under state human-rights and public-accommodation laws if marriage rights were recognized do not involve same-sex couples at all. For example, *Dale* v. *Boy Scouts of America*, 734 A.2d 1196 (N.J. 1999), rev'd, 530 U.S. 640 (2000), considered whether the Boy Scouts violated New Jersey's public-accommodations law by prohibiting gay scout leaders, without any mention of the scout leaders' marital status and well before marriage of same-sex couples was recognized—or even a subject of widespread debate—in New Jersey or any other State. And *Gay Rights Coalition of Georgetown University Law Center* v. *Georgetown University*, 536 A.2d 1 (D.C. 1987), addressed whether the District of Columbia's Human Rights Act required Georgetown University to afford recognition to gay and lesbian student organizations, which would have allowed them to use university facilities for group meetings in the same way that oth-

er campus organizations did. The case was not about marital rights but about student groups' access to meeting space on campus.

Cases on housing discrimination to which opponents of marriage rights point for these purposes have even less to do with recognition of the right of same-sex couples to marry. The housing cases typically address refusals to rent to unmarried *heterosexual* couples because of religious objections to premarital sexual activity. See, *e.g.*, *Thomas* v. *Anchorage Equal Rights Comm'n*, 102 P.3d 937, 939 (Alaska 2004); *Smith* v. *Fair Emp't & Hous. Comm'n*, 913 P.2d 909, 912 (Cal. 1996); *Swanner* v. *Anchorage Equal Rights Comm'n*, 874 P.2d 274, 276 (Alaska 1994) (per curiam); *Attorney Gen.* v. *Desilets*, 636 N.E.2d 233, 235 (Mass. 1994). If a legal prohibition against discrimination in favor of married couples trumps a landlord's religiously based objection to cohabitation by unmarried couples, that presumably would be true regardless of the sexual orientation of the prospective unmarried renters, and in any event would say nothing about discrimination against same-sex married couples.

More to the point, if discrimination in housing on the basis of sexual orientation is barred by state law, it will matter not at all whether a lesbian or gay couple is married; either way, the law will apply in the same manner, as will the legal rules for adjudicating any religiously motivated refusals to rent on the basis of sexual orientation. Indeed, many of the cases addressing discrimination against lesbians and gay men in the housing context also arise independently of the right to marry. For example, a New York administrative judge found that landlords' refusal to accept rent checks from, refusal to renew a lease

with, and commencement of eviction proceedings against a tenant because of his sexual orientation violated the antidiscrimination protections in the Administrative Code of the City of New York. See *119-121 E. 97th St. Corp.* v. *N.Y. City Comm'n on Human Rights*, 642 N.Y.S.2d 638, 640 (App. Div. 1996) (landlords violated New York Administrative Code provision making it "an unlawful discriminatory practice to refuse to rent or lease a housing accommodation because of the actual or perceived disability or sexual orientation of the lessee"). Similarly, a Wisconsin court found that a landlord's revocation of an offer of lease to a single lesbian woman upon learning of her sexual orientation violated the antidiscrimination provisions of Madison's General Ordinances. See *Wisconsin ex rel Sprague* v. *City of Madison*, 555 N.W.2d 409 (table), 1996 WL 544099 (Wis. Ct. App. 1996).

The same is true of employment-discrimination cases, and of assertions of religious defenses in those cases. For example, *Terveer* v. *Billington*, 34 F. Supp. 3d 100 (D.D.C. 2014), involved claims of sex-stereotyping and religious discrimination by an employee of the Library of Congress who claimed that he was subjected to adverse employment actions and aggressive proselytizing at work about the sin of homosexuality when his supervisor learned that he is gay. Similarly, *Erdmann* v. *Tranquility Inc.*, 155 F. Supp. 2d 1152 (N.D. Cal. 2001), involved Title VII and state-law claims of religious discrimination as well as state-law claims of discrimination based on sexual orientation by a nurse whose supervisor told him that "homosexuality was immoral and that he would go to hell if he did not give up his homosexuality and become a Mormon." *Id.* at 1161. Neither case involved discrimination on the basis of

marriage to a spouse of the same sex. And *Hall* v. *Baptist Memorial Health Care Corp.*, 215 F.3d 618 (6th Cir. 2000), addressed the applicability of Title VII's religious exemption in a case brought by an employee of a Baptist college who was fired for being a lesbian and a member and ordained lay minister of a church that welcomed lesbian and gay parishioners. Because the Southern Baptist Convention, with which the college was affiliated, deemed homosexuality to be a "perversion" and an "abomination" (*id.* at 622), the court held that the college's termination of the employee was religiously based and therefore came within the ambit of the exception. Nothing about the employee's claims, the protections of Title VII that she invoked, or the college's invocation of the religious exemption had anything to do with marriage or religiously based opposition to a marital right for same-sex couples.

When religious objectors have challenged the applicability of antidiscrimination laws, they have often done so by relying on the Free Speech, Free Exercise, or Free Association Clauses of the First Amendment. Those sorts of challenges are neither new nor unprecedented; this Court has an established jurisprudential framework for resolving them. See, *e.g.*, *Dale*, 530 U.S. at 656 ("New Jersey's public accommodations law * * * runs afoul of the Scouts' freedom of expressive association."); *United States* v. *Lee*, 455 U.S. 252, 257 (1982) (recognizing that "compulsory participation in the social security system interferes with [Amish employers'] free exercise rights"); *Wooley*, 430 U.S. at 717 (invalidating compelled display of a license-plate slogan that offended individual religious beliefs); *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943) (invalidating compulsory-flag-salute statute challenged by religious

objectors). This framework will not be altered if the Court recognizes a constitutional right of same-sex couples to marry.

The case-by-case development of the law on the intersection of religious rights and the right to be free from discrimination—whether on the basis of sexual orientation or otherwise—thus is ongoing and will continue whether or not this Court recognizes a constitutional right to marry. In this respect, there is nothing exceptional about the right to marry that would make the ordinary approach to religious accommodation unworkable; as with other rights that have been established either by judicial decision or by legislation and that might be in tension with religious belief, existing doctrine can be relied upon to resolve those disputes that do arise. There is, accordingly, no need for the Court to speculate about the ways in which religious objections to the marriage right might be manifested. As the Ninth Circuit recently wrote:

> Whether a Catholic hospital must provide the same health care benefits to its employees' same-sex spouses as it does their opposite-sex spouses, and whether a baker is civilly liable for refusing to make a cake for a same-sex wedding, turn on state public accommodations law, federal anti-discrimination law, and the protections of the First Amendment. These questions are not before us.

Latta, 771 F.3d at 475. They likewise have no bearing on the resolution of the questions presented to this Court in these cases.

C. Arguments That Religious Organizations May Lose Tax Exemptions Or Public Subsidies If The Court Recognizes The Right To Marry Are Misplaced.

Opponents of the marriage right also contend that federal recognition of that right will result in the loss of access to government dollars by religious organizations and individuals who fail to honor state antidiscrimination laws. In the lower courts, these objectors offered a litany of complaints about problems that supposedly would beset religious organizations and institutions if the right to marry were recognized; we anticipate that they will do so again in this Court. Like predictions about an explosion in discrimination claims, this concern is overblown. Federal and state laws either prohibit tax exemptions or public subsidies for organizations that discriminate on the basis of sexual orientation, or they do not; nothing about the reach of those provisions turns on whether the people who are the object of the discrimination are single or married. Thus, the risk of loss of public dollars is just the same whether or not marriage rights are recognized; the Court's decision here should have no effect whatever on access to public money.

"Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that [recipients] are not obligated to accept." *Grove City Coll.* v. *Bell*, 465 U.S. 555, 575 (1984).[3] It is thus

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[3] That is true regardless of whether the recipients are private parties, as in *Grove City College*, or States, as in *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1, 17 (1981) ("Congress may fix the terms on which it shall disburse federal money to the States" in a manner "much in the nature of a con-

well settled that tax exemptions may be conditioned on compliance with antidiscrimination laws. See *Bob Jones Univ.* v. *United States*, 461 U.S. 574 (1983) (affirming the denial of tax-exempt status to a university based on its ban on interracial dating, which was grounded in religious doctrine). So may receipt of financial support from the government. See, *e.g.*, Civil Rights Act of 1964, tit. VI, 42 U.S.C. § 2000d (prohibiting discrimination on the basis of race, color, or national origin in any program or activity that receives federal funding); *Barnes* v. *Gorman*, 536 U.S. 181 (2002) (recognizing Title VI as a valid exercise of Congress's spending power); Education Amendments of 1972, tit. IX, 20 U.S.C. § 1681 (prohibiting discrimination on the basis of sex in any educational program or activity that receives federal funding); *Davis* v. *Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999) (recognizing Title IX as a valid exercise of the spending power); Rehabilitation Act § 504, 29 U.S.C. § 794 (preventing discrimination on the basis of disability in any program or activity that receives federal financial assistance); *Barnes*, 536 U.S. at 185 (recognizing that Section 504 is identical to Title VI in enforcement authority). So, too, may the awarding of government contracts. See *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989).

The effect of such conditions, like the scope of state antidiscrimination laws themselves, is not before the Court and will not be meaningfully altered by recognition of the right to marry. The same is true for any religious exceptions or exemptions to such conditions that might be available—and hence, any disputes over the availability of exemptions would

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tract: in return for federal funds, the States agree to comply with federally imposed conditions.").

arise regardless of whether the Court recognizes marriage rights. Again, that is because any protections that either exist today or are likely to be enacted in the future would address discrimination on the basis of sexual orientation broadly and would not be limited to the subclass of people who happen to be married to a partner of the same sex.

That explains the flaw in what is perhaps the most commonly offered example of dire consequences that supposedly would result from recognition of marriage rights: the concern that some religious organizations effectively would be barred from providing government-funded adoption services because they would be required, against their convictions, to offer those services to same-sex couples. Those who make this argument typically point to Catholic Charities of Boston, which discontinued adoption services after the Massachusetts Supreme Court recognized the right of same-sex couples to marry under the state constitution. Patricia Wen, *Catholic Charities Stuns State, Ends Adoptions*, Boston Globe, Mar. 11, 2006, at A1. But this example actually shows why it is a category mistake to identify the recognition of marriage rights as the source of such disputes.

Massachusetts first adopted legislation prohibiting discrimination on the basis of sexual orientation in 1989; it extended adoption rights to same-sex couples in 1993. 1989 Mass. Acts 516 (amending Mass. Gen. Laws ch. 151B, § 4 to prohibit discrimination on the basis of sexual orientation); *In re Adoption of Tammy*, 619 N.E.2d 315, 319-320 (Mass. 1993) (recognizing right of same-sex couples to adopt). Because Catholic Charities provided adoption services pursuant to "an adoption contract with the [Massachusetts] Department of Social Services," it "had to com-

ply with state regulations that prohibit discrimination based on sexual orientation." Patricia Wen, *Church Reviews Role in Gay Adoptions*, Boston Globe, Nov. 4, 2005, at B2. Catholic Charities complied with this requirement between 1997 and 2005, placing thirteen foster children with gay or lesbian parents. See Patricia Wen, *"They Cared for the Children": Amid Shifting Social Winds, Catholic Charities Prepares to End Its 103 Years of Finding Homes for Foster Children and Evolving Families*, Boston Globe, June 25, 2006, at A1. Catholic Charities was always free to provide state-funded adoption services, or not, subject to the requirements of Massachusetts law, and it chose to do so.

Although Catholic Charities may have changed its policy in the wake of Massachusetts's recognition of a marriage right for same-sex couples, that right was established a decade after recognition of the right of same-sex couples to adopt. Massachusetts's earlier decision not to fund or subsidize programs that discriminate on the basis of sexual orientation was what imposed the duty; and although we believe that the validity of that exercise of Massachusetts's spending power was proper under the legal authority cited above, whether that is so also does not turn on the status of a marriage right. It thus should be manifest that—whatever one's view of Catholic Charities' position on adoption by same-sex couples—that position (and the prospect that such organizations will refrain from offering state-funded adoption services) has no bearing on whether the constitutional right to marry should be recognized.

III. Religious Objections Do Not Justify Refusal To Recognize Rights.

When the hyperbole is brushed aside, the real concern expressed in the lower courts (and likely also to be expressed in this Court) by many opponents of the right to marry is not that recognition of a marriage right would trigger application of particular state antidiscrimination provisions. It is, instead, that the recognition of marriage equality as a constitutional norm would reflect societal disapproval of religiously based beliefs that marriage between partners of the same sex (or homosexuality more generally) is morally wrong. See, *e.g.*, Becket Fund 6th Cir. Amicus Br. at 6 (arguing that "[t]his Court's disapprobation would cast suspicion on religious objectors in a way that existing laws against gender and sexual orientation discrimination do not").

That is not a constitutional argument, and it is not an argument that is grounded in either logic or this Court's precedents. The simple fact is that proscriptions against discrimination advance values "embodied in our Bill of Rights—the respect for individual dignity in a diverse population." *Gay Rights Coal. of Georgetown*, 536 A.3d at 32. Thus, although our constitutional order ensures a profound respect for the exercise of religion—and holds inviolable freedom of religious belief—this Court has consistently rejected the argument that recognition of fundamental rights or of the right to equal treatment should be denied because some people disfavor recognition of those rights on spiritual or theological grounds.

"There is nothing new about civil equality-religious liberty clashes, for they proliferated over the issue of race." William N. Eskridge Jr., *Noah's*

Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms, 45 Ga. L. Rev. 657, 660 (2011). And in resolving those clashes, as this Court and legislatures began to mandate an end to race discrimination, the Court steadfastly rejected arguments that the advance of racial equality should be denied because it interfered with religious belief.

For example, Title II of the Civil Rights Act requires that "all persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation * * * without discrimination or segregation on the ground of race, color, religion, or national origin." 42 U.S.C. § 2000a. In *Newman* v. *Piggie Park Enterprises, Inc.*, 256 F. Supp. 941, 944 (D.S.C. 1966), aff'd per curiam, 390 U.S. 400 (1968), a business owner challenged Title II, claiming that it violated the Free Exercise Clause by requiring him to act inconsistently with "his religious beliefs," which "compel[led] him to oppose any integration of the races." The district court rejected that argument. This Court affirmed, describing the free exercise argument as "patently frivolous." 390 U.S. at 402 n.5.

The Court considered and rejected the same sorts of religious objections to marriage of interracial couples, striking down Virginia's anti-miscegenation statutes in *Loving* v. *Virginia*, 388 U.S. 1 (1967). The trial court in *Loving* had relied in part on religious grounds to uphold the state-law ban on the marriage of interracial couples, reasoning that "'[a]lmighty god created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there

would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.'" *Id.* at 3. Whatever the sincerity of the religious beliefs underlying that analysis, this Court emphatically rejected the district court's reasoning, holding that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Id.* at 12.

More recently, the Court addressed religious objections to antidiscrimination laws in *Bob Jones University* v. *United States*, 461 U.S. 574 (1983). In that case, a religious university sued over the IRS's determination that it did not qualify as a tax-exempt organization under the Internal Revenue Code because the university's religiously motivated ban on interracial dating was inconsistent with the public policy against subsidizing racial discrimination. *Id.* at 580-582. The university argued that its "raison d'etre is the propagation of religious faith," that "[i]ts rule against interracial dating is a matter of religious belief and practice," and that "[d]enial of tax exemption to a religious ministry because its established teaching and practice violates 'Federal public policy' violates rights of that ministry protected by the Free Exercise Clause of the First Amendment." *Bob Jones Univ.* v. *United States*, Brief for Petitioner at 17, 1981 U.S. S. Ct. Briefs LEXIS 1345 (Nov. 27, 1981); see also *Goldsboro Christian Sch.* v. *United States*, Brief for Petitioner at 21-22, 1981 U.S. S. Ct. Briefs LEXIS 1346 (Nov. 27, 1981) (explaining that a co-plaintiff religious school "discriminates out of a firmly held religious belief that separation of the races is scripturally mandated" and arguing that "[a]pplication of the IRS's policy to [the school] would severely burden the free exercise of that belief").

Religious groups that filed *amicus* briefs in support of the university argued that the denial of a federal tax exemption "will inevitably be used to justify subordination of religious belief to current notions of public policy" because, for example, "[w]hat the Government might view as a violation of the public policy against sex discrimination, evangelicals would consider faithful adherence to Scriptural teaching with respect to the proper roles of women within the church." *Bob Jones Univ.* v. *United States*, Brief of National Association of Evangelicals as Amicus Curiae in Support of Petitioner at 2, 1981 U.S. S. Ct. Briefs LEXIS 1360 (Nov. 25, 1981); see also *Bob Jones Univ.* v. *United States*, Brief Amicus Curiae of the Center for Law and Religious Freedom of the Christian Legal Society in Support of Petitioner at 10, 1981 U.S. S. Ct. Briefs LEXIS 1363 (Nov. 25, 1981) ("The decision below opens the way to denial of tax exempt status not only for schools, but also for churches whose sincerely held beliefs may discriminate against minorities.").

Those contentions—which the petitioners and their *amici* in *Bob Jones* advanced with no less sincerity and no less force than the ones that are being made today in the context of adjudicating claims for a marriage right—did not give this Court pause in denying the university's claim. The Court straightforwardly held that the "governmental interest" in eradicating racial discrimination in education "substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs." *Bob Jones Univ.*, 461 U.S. at 604. That holding has obvious relevance here. If sincerely held religious beliefs did not suffice to exempt religious institutions from the *application* of broad antidiscrimination rules, those same sorts of beliefs surely

should not altogether preclude baseline *recognition* of antidiscrimination principles.

* * *

Ultimately, the prospect that discrimination lawsuits might follow recognition of a marriage right is an immaterial distraction here. The question presented in these cases is, fundamentally, whether the Fourteenth Amendment guarantees the right of same-sex couples to marry. In deciding that question, it is neither necessary nor appropriate for the Court to take account of a host of speculative, hypothetical issues that are not now, and might never be, before it. Just as the Court in *Loving* did not address all possible conflicts that might later arise over issues surrounding discrimination against interracial couples, this Court need not now address all the legal consequences that might follow from recognition of a right to marry. Those questions are properly left for another day, when—if they do in fact arise—they can be resolved by straightforward application of the substantive rules and procedures that have long governed such questions under the First and Fourteenth Amendments.

CONCLUSION

The judgments of the Sixth Circuit in these cases should be reversed.

Respectfully submitted.

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